No. 93-146

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,

Petitioners,

vs.

BEHM FUNERAL HOME, INC., a corporation; FRANK J. BEHM, an individual; FRANK C. "CHUCK" BEHM, an individual; PEGGY BEHM, an individual; GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, an individual; SAMUEL A. MILLIKEN, an individual; and DARYL THROCKMORTON, an individual,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD L. HICKS, JR., ESQ.

MEYER, UNKOVIC & SCOTT
1300 Oliver Building
Pittsburgh, PA 15222
(412) 456-2800

Attorneys for Respondents, Samuel A. Milliken and Daryl Throckmorton, and Counsel of Record for Respondents

WALTER C. FADEREWSKI, ESQ.

FADEREWSKI & NEWBORG
One Mellon Bank, Suite 2122
P.O. Box 1506
Pittsburgh, PA 15230
(412) 338-5930

Attorneys for Respondent, Paul M. Lesako

C. ROBERT MCCALL, ESQ.

PICADIO MCCALL KANE & NORTON
USX Tower #4680
Pittsburgh, PA 15219
(412) 288-2900

Attorneys for Respondents, Behm/Rohanna Defendants

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED FOR REVIEW

1. Whether a cemetery's claim for conspiracy to fix prices in violation of Section 1 of the Sherman Act is properly subject to dismissal by way of summary judgment when the undisputed evidence reveals that: (a) not all of the funeral directors imposed a casket handling fee and those that did adopted the fee at different times, in widely varying amounts, and years before the cemetery began selling caskets; (b) the casket handling fees were condoned by the Federal Trade Commission as a legitimate means of recouping costs incurred by funeral directors and were imposed by the cemetery itself when customers purchased caskets and vaults from sources other than the cemetery; and (c) no price information was shared between the funeral directors at any trade association meeting such that, prior to the initiation of cemetery's lawsuit, the funeral directors were unaware of the various amounts each funeral director charged as a casket handling fee?

2. Whether a cemetery's claim of a *per se* unlawful tying arrangement in violation of Section 1 of the Sherman Act is properly subject to dismissal by way of summary judgment when the undisputed evidence reveals that: (a) the funeral directors never conditioned the sale of their funeral services upon the purchase of caskets from them and no customer was ever refused funeral services from the funeral directors because the customer bought a casket from another source, including the cemetery; (b) any customer of funeral services had an option

QUESTIONS PRESENTED FOR REVIEW – Continued

to avoid the casket handling fee since not all of the funeral directors in the Greene County, Pennsylvania, market imposed such a fee; and (c) no individual funeral director possessed more than 40% of the Greene County, Pennsylvania, funeral services market?

3. Whether a cemetery is barred from raising on appeal any issue as to the applicability of the decision in *Eastman Kodak Company v. Image Technical Services* to its claims under Section 1 of the Sherman Act when it is undisputed that: (a) the cemetery never raised the *Kodak* decision to the district court by way of summary judgment argument or through an amendment to its complaint reflecting the cemetery's new definition of market power as being the market over caskets once a particular funeral director had been selected; and (b) the cemetery never developed through either expert testimony, market research or actual customer testimony the necessary facts to support the application of the *Kodak* decision or the cemetery's new market power definition?

4. Whether the decision in *Eastman Kodak Company v. Image Technical Services* is inapposite to the cemetery's claim for unlawful tying arrangement in violation of Section 1 of the Sherman Act since the relevant market in a case involving non-unique services or products is never the tied product marked (*i.e.*, caskets), but rather only the tying product market (*i.e.*, funeral services)?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CITATIONS vi

COUNTERSTATEMENT OF THE CASE 1

A. *Procedural Background* 1

B. *Factual Background* 3

REASONS FOR DENYING THE PETITION..... 9

I.

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY FOUND THAT A RATIONAL JURY COULD NOT INFER A CONSPIRACY TO FIX PRICES BY RESPONDENT FUNERAL DIRECTORS IN LIGHT OF THE UNDISPUTED EVIDENCE THAT NOT ALL OF THE FUNERAL DIRECTORS IMPOSED CASKET HANDLING FEES, THOSE THAT DID ADOPTED THE FEES AT DIFFERENT TIMES, IN WIDELY VARIOUS AMOUNTS AND YEARS BEFORE PETITIONERS BEGAN SELLING CASKETS, AND NO PRICE INFORMATION WAS SHARED BETWEEN THE FUNERAL DIRECTORS AT ANY ASSOCIATION MEETINGS. THEREFORE, SUMMARY JUDGEMENT IN FAVOR OF THE RESPONDENT FUNERAL DIRECTORS WAS APPROPRIATE..... 10

TABLE OF CONTENTS – Continued

Page

II.

THE COURT OF APPEALS AND THE DISTRICT COURT PROPERLY FOUND THAT PETITIONERS FAILED TO STATE A CLAIM FOR UNLAWFUL TYING UNDER EITHER THE *PER SE* TEST OR RULE OF REASON APPROACH. THEREFORE, PETITIONERS' SHERMAN ACT CLAIMS FOR UNLAWFUL TYING WERE PROPERLY DISMISSED 14

III.

PETITIONERS' RELIANCE ON THE DECISION IN *EASTMAN KODAK COMPANY V. IMAGE TECHNICAL SERVICES* IS PROCEDURALLY BARRED SINCE PETITIONERS NEVER RAISED THE DECISION OR DEVELOPED THE NECESSARY FACTS BEFORE THE DISTRICT COURT TO SUPPORT ANY CONSIDERATION OF PETITIONERS' ARGUMENT ON APPEAL 18

IV.

EVEN IF PETITIONERS ARE NOT PROCEDURALLY BARRED FROM RAISING THE *KODAK* DECISION, THE THIRD CIRCUIT CORRECTLY NOTED THAT THE *KODAK* CASE IS INAPPOSITE TO PETITIONERS' LAWSUIT AND DOES NOT COMPEL A CONTRARY HOLDING THAT PETITIONERS FAILED TO STATE CLAIMS OF VIOLATIONS UNDER THE SHERMAN ACT 20

CONCLUSION 24

TABLE OF CITATIONS

Page(s)

CASES:

American Tobacco Company v. United States, 328 U.S. 781 (1946) 13

Brown Shoe Co. v. United States, 370 U.S. 294 (1962) 23

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 23

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 23

Eastman Kodak Company v. Image Technical Services, 112 S.Ct. 2072 (1992) 8, 10, 18, 19, 20, 21

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) 17, 18

King v. Idaho Funeral Service Association, 862 F.2d 744 (9th Cir. 1988)..... 23

Kline v. Coldwell, Banker & Co., 508 F.2d 226 (9th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975) 23

Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986)..... 11, 12, 13, 23

Monsanto Company v. Spray Rite Service Corp., 465 U.S. 752 (1984) 11, 13

Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985)..... 22

Rondeau v. Mosinee Paper Corp., 422 U.S. 49 (1975) 20

Seidenstein v. National Medical Enterprises, Inc., 769 F.2d 1100 (5th Cir. 1985)..... 23

Shop & Save Food Markets, Inc. v. Pneumo Corp., 683 F.2d 27 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982) 23

TABLE OF CITATIONS – Continued

Page(s)

Spectrum Sports, Inc. v. McQuillan, 113 S.Ct. 884 (1993) 23

Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) 17, 18

Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp., 959 F.2d 468 (3d Cir.), *cert. denied*, 113 S.Ct. 196 (1992).....8, 9, 10, 22

Ungar v. Dunkin' Donuts of America, Inc., 531 F.2d 1211 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976) 16

United States v. Citizens and Southern National Bank, 422 U.S. 86 (1975) 23

United States v. E.I. DuPont de Nemours & Co., 351 U.S. 377 (1956) 22

Universe Tankships, Inc. v. United States, 528 F.2d 73 (3d Cir. 1975) 20

COUNTERSTATEMENT OF THE CASE

A. *Procedural Background*

On February 2, 1988, Petitioners filed this action in the United States District Court for the Western District of Pennsylvania, alleging claims against Respondents[1] for unlawful tying arrangements and group boycotts in violation of the Sherman and Clayton Anti-trust Acts, 15 U.S.C. §§1 and 14 respectively, and for tortious interference with contractual relations under Pennsylvania law. (A-2, A-10). After more than three years of discovery,

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[1] For purposes of this brief, the term "Respondents" refers to each individual and corporation named originally as a defendant in the caption of Petitioners' case. Respondents Behm Funeral Home, Inc., Frank J. Behm, Frank C. "Chuck" Behm, Gregory Rohanna, Samuel Milliken, Daryl Throckmorton and Paul Lesako are the parties who are filing this opposition brief and are referred to hereinafter as the "Respondent Funeral Directors." Respondents Gordon and Barret Greenlee ("the Greenlees") have not participated in any of the proceedings subsequent to the district court's entry of summary judgment against Petitioners and have not joined in the filing of this brief. The Greenlees and the Respondent Funeral Directors are collectively referred to hereinafter as the "Funeral Directors."

Respondent Peggy Behm is not a party to any of the issues raised by the petition for writ of certiorari, those issues having been abandoned by Petitioners on appeal to the United States Court of Appeals for the Third Circuit. Therefore, Respondent Peggy Behm has not joined in this opposition brief.

Finally, to the extent required by Rule 29.1 of this Court's Rules, Respondent Behm Funeral Home, Inc., is a Pennsylvania corporation owned and operated by Respondents Frank J. Behm, Frank C. Behm and Gregory Rohanna. Behm Funeral Home has no parent company or subsidiary, except a wholly-owned subsidiary known as Behm Leasing & Rental Company.

Petitioners moved on September 16, 1991, for partial summary judgment as to the liability of the Respondents for unlawful tying and, on the same date, Respondents moved for summary judgment as to all the claims raised by Petitioners against them. (A-2, A-10).

On July 2, 1992, the district court entered a thirty-three page opinion and order denying Petitioners' partial summary judgment motion and granting Respondents' separate motions for summary judgment. (A-17-A-35). The district court also dismissed as moot all other outstanding motions not addressed by its July 7, 1992 order. (A-32, A-35).

On July 30, 1992, Petitioners appealed the district court's order to the United States Court of Appeals for the Third Circuit. On appeal, Petitioners abandoned their arguments of error as to the district court's dismissal of their claims against Respondent Peggy Behm, their claims for unlawful tying of vaults to funeral services, and their claims for violations under Section 3 of the Clayton Act, choosing instead to raise only issues pertaining to their claims under Section 1 of the Sherman Act. (A-2, A-3).

On April 26, 1993, the Third Circuit affirmed the district court's dismissal of Petitioners' action and taxed costs against Petitioners. (A-2, A-3, & A-9). On May 9, 1993, Petitioners requested the Third Circuit to reconsider its affirmance of the district court's dismissal and suggested a rehearing *en banc*. On May 24, 1993, the Third Circuit denied Petitioners' request.

On May 27, 1993, the district court, upon motion of the Respondent Funeral Directors and Peggy Behm,

found that it was clear from the record that "the [Petitioners'] counsel violated Federal Rule of Civil Procedure 11 in continuing to prosecute this action after it was apparent that it had no merit." (SA-1-SA-2). On June 10, 1993, Petitioners requested the district court to reconsider its May 27, 1993 finding, which the district court denied on July 27, 1993. (SA-4-SA-5). On that same date, the district court entered a memorandum order supporting its finding of a Rule 11 violation and ordering Petitioners' counsel to pay $20,000 for distribution to the Respondent Funeral Directors and Peggy Behm on a pro rata basis. (SA-3-SA-6).

Shortly before the sanction order was entered, Petitioners filed this Petition for Writ of Certiorari to this Court.

B. *Factual Background*

This lawsuit involves certain anti-trust allegations asserted by a cemetery located in Greene County, Pennsylvania, against the Funeral Directors, who are located in and/or do business in Greene County, Pennsylvania. (A-2, A-11). In recent years, the Funeral Directors and other funeral homes and directors in the Greene County market area came under competition from third-party sellers of caskets and burial vaults. (A-2). These sellers underpriced the funeral directors' charges for these types of funeral merchandise, thus depriving the funeral directors of substantial profits. (A-2).

In response, the Funeral Directors, through their respective trade associations, met with the other funeral homes and directors doing business in Greene County,

Pennsylvania, and discussed the problem of third-party sales and what to do about them. (A-2). As a result of these meetings, the Funeral Directors ran a series of joint advertisements warning the public of the "dangers" of buying funeral merchandise from third-party sellers. (A-2). The joint advertisements were truthful and were directed at the activities of certain door-to-door salesmen and not those of the Petitioners. (A-8). In fact, at the time the Funeral Directors began placing the advertisements, Petitioners were not even in the business of selling caskets. (A-8, A-12).

In addition to the joint advertisements and *not as a result of their attendance at the association meetings,* some but not all of the Funeral Directors imposed "casket handling fees" on customers who purchased their caskets from a source other than the funeral director performing the funeral service. (A-14). These fees were designed to recover the costs which a funeral director incurred when handling caskets purchased from third-party vendors and are condoned by the Federal Trade Commission. (A-14). In addition, when Petitioners entered the funeral merchandise market, Petitioners themselves imposed their own handling fees when customers purchased caskets and vaults from others. (A-14).

The Funeral Directors who adopted casket handling fees did so at various times and before Petitioners began selling caskets. (A-3). Moreover, the casket handling fees charged varied widely, ranging from $200 to $425. (A-3). The reason for this variance was because, prior to the initiation of Petitioners' lawsuit, none of the Funeral Directors were aware of what amount, if any, each of the other Funeral Directors were charging for the handling of

third-party caskets. (A-25). In fact, no price information of any kind was shared between the Funeral Directors at any of the association meetings they attended. (A-3).

Despite the joint advertising and the imposition of casket handling fees, the Funeral Directors continued to handle funeral services for decedents who were buried at the Petitioners' cemetery and to provide funeral services for individuals who purchased caskets and vaults from the Petitioners. (A-28). Additionally, none of the Funeral Directors' price lists conditioned the provision of funeral services upon the purchase of caskets and no customers were ever refused services because the customers had bought their caskets from a third-party seller. (A-4, A-18). Moreover, the Funeral Directors, as a group, never interfered with any contractual relationship of the Petitioners with either their employees or customers and, indeed, none of the Petitioners' contracts with their customers were cancelled and none of their employees or independent contractors left their employ as a result of the Funeral Directors' activities. (A-13, A-15).

The joint advertising enacted by the Funeral Directors was endorsed by at least eight other funeral directors or homes who did business in Greene County, Pennsylvania. (A-4, A-12). Those other funeral directors and homes were not joined as defendants in this case and there is no evidence that those funeral directors and homes charged a casket handling fee. (A-4).

After three years of discovery, Petitioners could produce no evidence that the Respondent Funeral Directors agreed and conspired to fix prices by adopting a uniform casket handling fee as a means of defeating competition.

(A-3). Further, Petitioners could produce no evidence, by way of written contract and/or actual or threatened refusal to provide funeral service to a customer, which indicated that the Respondent Funeral Directors conditioned the provision of their funeral upon the customers' purchase of caskets from them. (A-4). Finally, Petitioners produced no evidence, by way of marketing survey, affidavit or deposition testimony, that any customer was ever coerced into buying a casket from one of the Respondent Funeral Directors. (A-4).

Moreover, the only market survey or study prepared by Petitioners was a "questionable market survey based on the number of funerals conducted by defendants divided by the total deaths in Greene County." (A-5). Based upon this survey, Petitioners' own evidence indicated that none of the Respondent Funeral Directors had more than 40% of the share of funeral services market in Greene County, Pennsylvania. (A-5).

Faced with the above facts, the district court concluded that Petitioners' claims under both the Sherman and Clayton Acts were meritless, thereby justifying a denial of Petitioners' partial summary judgment motion and a granting of the Respondent Funeral Directors' summary judgment motion. In fact, the district court found that the Petitioners' motions and briefs were plagued by "exaggerations and inaccurate interpretations" which "forced" the district court "to scrutinize with unusual care all of the [Petitioners'] representations." (A-18). Even under this unusual scrutiny, the district court found that Petitioners' claims were lacking in both fact and law. (A-17-A-32).

After analyzing Petitioners' claims for unlawful tying, group boycott and conspiracy to fix prices under both the *per se* and rule of reason approaches for anti-trust liability, the district court made the following observation about Petitioners' case:

> In summary, the plaintiffs have failed to come forward with sufficient evidence in support of their claims that the defendants engaged in concerted, anti-competitive activity within the meaning of Section 1 of the Sherman Anti-trust Act. They seem to presume that because the defendants are members of a trade organization, and because some of them expressed their displeasure with the plaintiffs' attempts to compete with them in casket sales, they have violated the Sherman Anti-trust Act. All of the evidence the plaintiffs offer in support of their claims, however, does not constitute sufficient evidence of a Section 1 violation to save the plaintiffs' claims from summary judgment.

(A-32).

On appeal, the Third Circuit Court of Appeals agreed with the district court and found that all of Petitioners' contentions were "meritless." (A-3). Specifically, as to Petitioners' claims for conspiracy to fix prices, the Third Circuit found that there was no evidence of concerted activity by the Funeral Directors. (A-3). Similarly, as to Petitioners' claims for *per se* unlawful tying, the Third Circuit found that there existed no express tying arrangement or fair inference thereof from the undisputed evidence in the record, that Petitioners produced no evidence of actual customer coercion, and that the record was devoid of any evidence indicating that any funeral

director possessed sufficient market power to be liable for a *per se* unlawful tying arrangement. (A-4, A-5). Additionally, the Third Circuit noted that, even under the rule of reason analysis, Petitioners' unlawful tying claims were without merit since Petitioners failed to produce any evidence that the Funeral Directors' activities harmed competition, rather than the Petitioners themselves. (A-7).

Furthermore, the Third Circuit found that the Petitioners' arguments as to the applicability of this Court's decision in *Eastman Kodak Company v. Image Technical Services,* 112 S.Ct. 2072 (1992), were barred both procedurally and substantively. Procedurally, the Third Circuit found that the Petitioners failed to raise the *Kodak* decision to the district court either in their pleadings or summary judgment argument or through sufficient evidence of either market studies or actual customers which would support Petitioners' argument that the relevant market at issue was the market over caskets once a particular funeral director had been selected. (A-5, A-6). In light of this failure, the Third Circuit found that Petitioners were barred procedurally from arguing on appeal the applicability of the *Kodak* decision. (A-6).

Furthermore, even if Petitioners could raise the issue, the Third Circuit found that the relevant market in a tying claim is never the tied product (*i.e.*, caskets), but rather the tying product market (*i.e.*, funeral services), citing its decision in *Town Sound and Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (3d Cir.), *cert. denied,* 113 S.Ct. 196 (1992). (A-6). Also, the Third Circuit noted that the *Kodak* decision did not change the application of

this general principle of anti-trust law to the Petitioners' case because the provision of funeral services and caskets was not unique. (A-7).

Finally, the Third Circuit addressed Petitioners' other claims of error by the district court and dismissed them accordingly on the basis that "none of them have any merit, even granting [Petitioners] all inferences in their favor." (A-7-A-9).

REASONS FOR DENYING THE PETITION

This Petition for Writ of Certiorari represents just another of the many avenues taken by Petitioners and their counsel in continuing to prosecute an action which is completely lacking in merit, both in fact and in law. The Petitioners attempt to attribute some importance to their case by stating that the Petition presents this Court with a "broad public policy issue of national significance." However, the fallacy with Petitioners' assertion is that they have presented no evidence to support any of their allegations of Section 1 Sherman Act violations. Both the district court and the Third Circuit Court of Appeals saw right through the smokescreen raised by Petitioners and the Respondent Funeral Directors respectfully request this Court to do the same by denying the Petition.

Additionally, a denial of this Petition is consistent with the previous decisions of this Court and the other circuits in the anti-trust area, as well as with the Third Circuit's decision in *Town Sound and Custom Tops,* which was cited in support of the Third Circuit's ruling in this

case. On October 5, 1992, this Court denied the petition for writ of certiorari filed from the *Town Sound and Custom Tops* decision. *See* 113 S.Ct. 196 (1992). This denial of certiorari occurred four months after this Court's decision in *Kodak* and supports the conclusion that the Third Circuit and the district court were correct in their analysis and dismissal of Petitioners' case.

For these reasons and the reasons set forth in this Brief, Respondent Funeral Directors respectfully request this Court to deny the Petition for Writ of Certiorari.

I.

THE COURT OF APPEALS AND THE DISTRICT COURT CORRECTLY FOUND THAT A RATIONAL JURY COULD NOT INFER A CONSPIRACY TO FIX PRICES BY RESPONDENT FUNERAL DIRECTORS IN LIGHT OF THE UNDISPUTED EVIDENCE THAT NOT ALL OF THE FUNERAL DIRECTORS IMPOSED CASKET HANDLING FEES, THOSE THAT DID ADOPTED THE FEES AT DIFFERENT TIMES, IN WIDELY VARIOUS AMOUNTS AND YEARS BEFORE PETITIONERS BEGAN SELLING CASKETS, AND NO PRICE INFORMATION WAS SHARED BETWEEN THE FUNERAL DIRECTORS AT ANY ASSOCIATION MEETINGS. THEREFORE, SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT FUNERAL DIRECTORS WAS APPROPRIATE.

The Petitioners' first reason for why its Petition for Writ of Certiorari should be granted is that the district court and Third Circuit Court of Appeals erred in holding that a jury could not rationally infer from the facts of

record the existence of a conspiracy among the Respondent Funeral Directors to fix prices. In short, Petitioners believe that once they have proven that meetings were held and that some funeral directors imposed casket handling fees, then sufficient evidence exists upon which a jury can rationally infer the existence of a conspiracy to fix prices. However, the fallacy in Petitioners' argument is quite evident.

As both the Third Circuit and the district court noted, in order for a conspiracy to exist with regard to the fixing of prices, there must be some evidence that price information was shared between the alleged co-conspirators and that the Funeral Directors agreed to act upon such information in a concerted effort. However, the undisputed evidence in this case reveals that no price information was shared between the Funeral Directors at any association meeting they attended. (A-3). In fact, the deposition testimony submitted by Petitioners at the time of summary judgment revealed that, prior to the initiation of this lawsuit, the Funeral Directors were unaware of what amount, if any, each of the Funeral Directors charged for casket handling fees. (A-25). Petitioners offered no evidence to contradict this conclusion. Therefore, under these circumstances, both the Third Circuit and the district court correctly held that a rational jury could not infer a concerted effort to fix prices.

Furthermore, the lower courts' decisions were correct and in accord with this Court's decisions in *Monsanto Company v. Spray Rite Service Corp.*, 465 U.S. 752 (1984) and *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In those cases, this Court held that if a defendant's conduct is consistent with both

permissible and anti-competitive motives, such conduct standing alone does not avoid summary judgment without evidence tending to exclude the possibility that the defendants acted independently. *See Matsushita Electric,* 475 U.S. at 588.

In the case at hand, the undisputed evidence reveals that not all of the Funeral Directors imposed casket handling fees and those that did adopted such fees at different times and years before Petitioners began selling caskets. (A-3, A-25). In fact, the evidence before the district court revealed that Petitioners did not begin selling caskets until October 1987, while Respondents Milliken and Throckmorton instituted their casket handling fees in 1984 and Respondent Behm Funeral Home adopted its casket handling fees prior to 1984. (A-11, A-12, A-25).

Furthermore, the fees charged by the Funeral Directors who adopted casket handling fees varied widely, ranging from $200 to $425. (A-3). Finally, these same fees were condoned by the Federal Trade Commission and imposed by the Petitioners themselves upon decedents who were buried at Petitioners' cemetery in a casket or vault not purchased from Petitioners. (A-14).

In light of these facts, the Third Circuit and district court had only one conclusion to reach, that being, a rational jury could not infer any concerted activity on the part of the Funeral Directors in imposing casket handling fees. Petitioners' only response to this argument is that "the facts are clear that Funeral Directors worked together closely on the fees they imposed" and that the Third Circuit failed to take a "look at the whole picture." However, it is the Petitioners who have ignored the

undisputed evidence in this case, for Petitioners' own evidence revealed that the Funeral Directors had no knowledge of when and in what amount each of the other Funeral Directors had imposed casket handling fees. (A-25).

Moreover, it is the Petitioners who are mistaken as to the respective burden they bear in opposing a summary judgment motion in an anti-trust lawsuit. As this Court explained in *Matsushita* and *Monsanto,* although inferences to be drawn from the underlying facts must be viewed in a light most favorable to the opposing party, such inferences when drawn from ambiguous evidence are circumscribed in anti-trust cases because a fine line demarcates concerted action that violates anti-trust law from legitimate business practices. *See Matsushita,* 475 U.S. 587-588; *Monsanto,* 465 U.S. at 762-64. As such, a jury is not permitted to speculate as to the cause from a chain of events; rather, the plaintiff must demonstrate adequately "a unity of purpose or common design and understanding, or a meeting of the minds" in order to prove concerted action. *See American Tobacco Company v. United States,* 328 U.S. 781, 810 (1946). Accordingly, this Court admonished in *Monsanto* that juries should not be permitted to infer the existence of an agreement in violation of the Sherman Act merely from the fact that the act occurred, for permitting such an inference would deter or penalize perfectly legitimate conduct. *See Monsanto,* 465 U.S. at 763-64.

In the case at hand, Petitioners failed to produce any evidence that the Respondent Funeral Directors adopted and imposed casket handling fees as a concerted action. In fact, the undisputed evidence revealed that the

Respondent Funeral Directors acted independently and without knowledge of the other funeral directors' activities and charges. In light of this evidence, both the Third Circuit and district court properly found that Petitioners had failed to state a claim for conspiracy to fix prices in violation of Section 1 of the Sherman Act. Therefore, this Petition for Writ of Certiorari should be denied.

II.

THE COURT OF APPEALS AND THE DISTRICT COURT PROPERLY FOUND THAT PETITIONERS FAILED TO STATE A CLAIM FOR UNLAWFUL TYING UNDER EITHER THE *PER SE* TEST OR RULE OF REASON APPROACH. THEREFORE, PETITIONERS' SHERMAN ACT CLAIMS FOR UNLAWFUL TYING WERE PROPERLY DISMISSED.

Another basis under which the Petitioners claim that a writ of certiorari is appropriate is the lower courts' determination that Petitioners' allegations of unlawful tying failed to state claims under Section 1 of the Sherman Act. In essence, Petitioners claim that the Third Circuit did not "look at the whole picture," as well as the "obvious" implications of the facts before the district court. However, it is the Petitioners who have failed to look at the undisputed evidence that was before the lower courts and upon which those courts relied in support of their determination that Petitioners failed to state any claim for unlawful tying in violation of the Sherman Act.

As the Petitioners acknowledged on appeal to the Third Circuit, their sole evidence of a tying arrangement was the Funeral Directors' price lists. These price lists

had no language which set forth a tying arrangement (*i.e.*, that funeral services would only be provided if the caskets were purchased from the Funeral Directors). (A-4). In fact, most of the price lists contained the following form language which clearly negated the existence of any tying arrangement:

> The goods and services shown below are those we can provide to our customers. *You may choose only those items you desire.*

Moreover, the use of price lists by funeral directors is required by the Federal Trade Commission and the language on the price lists which Petitioners cite as indicative of a tying arrangement was drafted by the FTC as part of its regulations in this area. Therefore, where one is required as a matter of law to provide customers with price lists that contain certain language, it cannot be inferred that such lists constitute tying arrangements.

Furthermore, as the Third Circuit noted, if Petitioners could show that a customer was threatened with or actually refused funeral services if he or she did not purchase a casket from one of the Funeral Directors, then an express tying arrangement or a fair inference thereof could be proven. (A-4). Unfortunately for Petitioners, no such evidence exists. (A-4). It was undisputed that customers were permitted to buy caskets elsewhere and, in fact, could have purchased caskets without incurring any casket handling fee by seeking the services of either the Greenlees or other funeral directors in the Greene County, Pennsylvania market who may not charge such fees. (A-4). Also, it was undisputed that no Funeral Director ever refused services to a customer because that customer bought a casket from a third party such as the

Petitioners. (A-4). Given this undisputed evidence, both the Third Circuit and the district court correctly found that no express contractual provision or a fair inference thereof could be supported by the record before them. (A-4, A-5, A-23).

Additionally, both courts noted that a tying arrangement could not be inferred by evidence of actual coercion because the Petitioners, for whatever reason, refused to produce any evidence that customers were coerced into buying caskets from the Funeral Directors. (A-4). Petitioners produced no marketing survey, but rather relied solely on the fact that casket handling fees were adopted by some of the Funeral Directors and on the assumption that consumers may buy both funeral services and caskets from some of the Funeral Directors to avoid the fee. However, as the Third Circuit correctly noted, such evidence does not establish consumer coercion. (A-4, citing *Ungar v. Dunkin' Donuts of America, Inc.*, 531 F.2d 1211, 1224-25 (3d Cir.), *cert. denied*, 429 U.S. 823 (1976)). This conclusion is especially true in light of the undisputed evidence in this case that customers in the Greene County, Pennsylvania, market had an option to avoid the casket handling fee by seeking the services of the Greenlees or the eight other funeral homes or directors who did business in the Greene County, Pennsylvania, market but were not joined as defendants by Petitioners. (A-4, A-5). Hence, the lower courts properly found that no genuine issue of material fact existed as to whether the Funeral Directors expressly tied the provision of funeral services to the sale of caskets.

Furthermore, even if such an express tying arrangement did exist, which is denied, Petitioners' own

evidence negated the existence of the second element for an unlawful tying arrangement, that being that the individual Funeral Directors held sufficient market power over the tying product. This Court has emphasized that a market power analysis is the first order of business in a *per se* unlawful tying analysis. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 9-29 (1984). As such, this Court has stated that condemnation of tying arrangements is appropriate only if the supplier supplying the tied product possesses sufficient market power to restrain competition on the merits by foreclosing purchases which would not otherwise be made. *Jefferson Parish*, 466 U.S. at 13-14. Moreover, this Court has held that a market share of no more than 40% is not a sufficient enough market power to restrain competition under a *per se* unlawful tying analysis. *See Jefferson Parish*, 466 U.S at 27; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953).

In the district court below, Petitioners introduced a market survey based upon the number of funerals conducted by the Funeral Directors divided by the total number of deaths in Greene County. (A-25). Even though both the district court and the Third Circuit questioned the accuracy of Petitioners' survey since it was based upon the total deaths rather than the total number of funerals held in Greene County, that survey revealed that none of the Respondent Funeral Directors had a market share of more than 40%. (A-5, A-25). As such, taking Petitioners' evidence as true, no individual Funeral Director has sufficient market power to be guilty of a *per se* Sherman Act violation in accordance with this Court's

previous holdings in *Jefferson Parish* and *Times-Picayune Publishing*.

Since the undisputed evidence indicated that there existed no tying arrangement and that no individual Funeral Director had sufficient market power in the provision of funeral services in Greene County, Pennsylvania, the Third Circuit and the district court properly held that Petitioners failed to produce sufficient evidence to raise a genuine issue of material fact as to whether the Respondent Funeral Directors were guilty of a *per se* unlawful tying arrangement in violation of the Sherman Act. Petitioners raise no issue in their Petition that should cause this Court to reverse this conclusion. Consequently, the Petitioners' claims for unlawful tying were properly dismissed by way of summary judgment and their Petition for Writ of Certiorari should be denied.

III.

PETITIONERS' RELIANCE ON THE DECISION IN *EASTMAN KODAK COMPANY v. IMAGE TECHNICAL SERVICES* IS PROCEDURALLY BARRED SINCE PETITIONERS NEVER RAISED THE DECISION OR DEVELOPED THE NECESSARY FACTS BEFORE THE DISTRICT COURT TO SUPPORT ANY CONSIDERATION OF PETITIONERS' ARGUMENT ON APPEAL.

Presumably, because the Petitioners could not fault the district court for its dismissal of Petitioners' unlawful tying claims on the basis that no individual Funeral Director possessed sufficient market power in the funeral services market, Petitioners argued on appeal to the Third Circuit that the relevant market in their case was the market over caskets once a particular funeral director

had been selected by a consumer. (A-5). If that theory was adopted, as Petitioners have argued it should be, then the market power of a funeral director in his own home is 100% and the case purportedly would come within the decision from this Court in *Eastman Kodak Company v. Image Technical Services*, 112 S.Ct. 2072 (1992). However, as the Third Circuit correctly noted, Petitioners are procedurally barred from raising such an issue on appeal for several reasons.

In the district court, the Petitioners never argued that the relevant market was the market over caskets once a particular Funeral Director had been selected by consumers. Rather, Petitioners raised this argument to the Third Circuit in light of this Court's decision in *Kodak*. However, as the Third Circuit correctly noted, the *Kodak* decision was decided on June 8, 1992, one month before the district court's decision on July 7, 1992. (A-5). Petitioners did not file a supplemental brief citing the *Kodak* decision. (A-5, A-6). Nor did Petitioners seek to amend their complaint to allege this new definition of market power or to file a motion for reconsideration bringing these matters to the district court before presenting the appeal to the Third Circuit. (A-6).

More importantly, Petitioners never even developed the facts necessary to support their new market definition while the case was in the district court. As the Third Circuit correctly noted, Petitioners could have engaged experts, performed market research or looked for actual customers who wanted to switch funeral homes or buy a third-party casket after the Funeral Director was selected but could not do so because of the Funeral Director's dominance in the market once he or she had been

selected. (A-6). However, for whatever reason, Petitioners introduced no such evidence at the district court level. (A-6).

In its petition, Petitioners failed to mention these procedural deficiencies or the fact that the Third Circuit found these deficiencies a bar to Petitioners' reliance on the *Kodak* decision as part of their appeal. The reason for their failure to disclose such deficiencies is obvious, for as the Third Circuit correctly noted, failure to raise a question which the district court never had a chance to decide bars a party from raising the issue on appeal. *See, Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61-62 n. 11 (1975); *Universe Tankships, Inc. v. United States*, 528 F.2d 73, 76 (3d Cir. 1975).

Any reliance by the Petitioners on this Court's decision in *Kodak* is inappropriate and cannot serve as a basis for the granting of a writ of certiorari. As such, Petitioners' request for certiorari should be denied.

IV.

EVEN IF PETITIONERS ARE NOT PROCEDURALLY BARRED FROM RAISING THE *KODAK* DECISION, THE THIRD CIRCUIT CORRECTLY NOTED THAT THE *KODAK* CASE IS INAPPOSITE TO PETITIONERS' LAWSUIT AND DOES NOT COMPEL A CONTRARY HOLDING THAT PETITIONERS FAILED TO STATE CLAIMS OF VIOLATIONS UNDER THE SHERMAN ACT.

In their Petition, Petitioners claim that the dismissal of their claims under Section 1 of the Sherman Act is contrary to this Court's decision in *Kodak*. According to Petitioners, the fault of the lower courts was their failure

to resolve the case by focusing on the particular facts disclosed in the record and the economic reality of the market at issue. However, it is again the Petitioners, not the lower courts, which have failed to focus on the particular facts disclosed in the record.

The Petitioners' blindness to the facts in this case is illustrated by the Petitioners' complete misreading of the *Kodak* decision. In *Kodak,* this Court was faced with the situation where the defendant controlled the vast majority of the market for servicing of its own copiers and virtually the entire market for its replacement parts. *Kodak,* 112 S.Ct. at 2077. The defendant had admitted that it had implemented a policy of selling parts to third parties only if they agreed not to buy servicing from independent service organizations and pressured its own suppliers into not selling parts to the third-party servicers. *Id.* at 2077-2078, 2080. Finally, and most importantly, the defendant in *Kodak* had a virtual monopoly on the parts market for its machines since no other vendor's parts or equipment were compatible with the Kodak machines and parts and, as such, the defendant's products were "unique." *Id.* at 2088. Given these facts, this Court held that the parts market, not the new copier market, was the proper focus of the anti-trust inquiry in that case. *Id.* at 2088.

In contrast, the case presented by this Petition does not involve "unique" or non-compatible funeral services or caskets. (A-7). The funeral services provided by the Respondent Funeral Directors, as well as the merchandise they sell, is easily substituted or interchangeable with the funeral services provided by the Greenlees and the eight other funeral directors not named as defendants in this

case, as well as the merchandise sold by Petitioners themselves. As such, the market situation which existed in the *Kodak* case does not exist in this case. (A-7).

As the Third Circuit found in its decision in *Town Sound and Custom Tops*, the relevant market in a tying claim where non-unique services and products are involved is never the tied product market, but rather the tying product market. (A-6). The Third Circuit's decision in *Town Sound and Custom Tops* was premised upon this Court's decision in *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956), in which this Court held that the relevant product market includes all products which are "reasonably interchangeable with" the product at issue. *E.I. DuPont*, 351 U.S. at 404. On October 5, 1992, this Court denied the petition for writ of certiorari filed in the *Town Sound and Custom Tops* case, thereby implicitly affirming the Third Circuit's holding that the relevant market is never the tied product market. *See* 113 S.Ct. at 196. As such, since the provision of funeral services and the sale of caskets are not unique, it is quite irrelevant whether the Respondent Funeral Directors have market power over caskets once they are selected by the customer to perform funeral services. (A-6).

Furthermore, the Third Circuit's disposition of the Petitioners' arguments regarding the applicability of the *Kodak* decision is in accord with this Court's decisions in other anti-trust cases. For example, contrary to Petitioners' contentions, this Court has held that one's membership in trade associations or attendance at their meeting where pricing and competitors are discussed is insufficient evidence of a violation under the anti-trust laws. *See Northwest Wholesale Stationers, Inc. v. Pacific*

Stationery & Printing Co., 472 U.S. 284, 295 (1985); *United States v. Citizens and Southern National Bank*, 422 U.S. 86, 113 (1975). Additionally, this Court held in *Matsushita Electric* that summary judgment in favor of a defendant is proper where the plaintiff fails to present evidence that tends to exclude the possibility that the alleged conspirators acted independently. *Matsushita Electric*, 475 U.S. at 553.

Additionally, the Third Circuit's decision in this case is consistent with this Court's recent pronouncement regarding the purposes of the Sherman Act. As this Court recently stated in *Spectrum Sports, Inc. v. McQuillan*, 113 S.Ct. 884 (1993):

> The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.

Spectrum Sports, 113 S.Ct. at 891-92, *citing Brunswick Corp. v. Bowl-o-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116-117 (1986); and *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

Finally, the lower courts' decisions in this case are consistent with the decisions from other circuits which have addressed similar issues as those raised by the Petitioners in this case. *See, e.g., Shop & Save Food Markets, Inc. v. Pneumo Corp.*, 683 F.2d 27 (2d Cir.), *cert. denied*, 459 U.S. 1038 (1982); *Seidenstein v. National Medical Enterprises, Inc.*, 769 F.2d 1100 (5th Cir. 1985); *King v. Idaho Funeral Service Association*, 862 F.2d 744 (9th Cir. 1988); *Kline v.*

Coldwell, Bankr. & Co., 508 F.2d 226 (9th Cir.1974), *cert. denied*, 421 U.S. 963 (1975).

Consequently there exists no basis upon which this Court should exercise jurisdiction by way of writ of certiorari. Accordingly, Petitioners' request for the same should be denied.

CONCLUSION

The only "obvious injustice" which exists in this case is the Petitioners' continued prosecution of claims where there exists no factual or legal basis for the same. Both the Third Circuit Court of Appeals and the district court below correctly determined that, after more than three years of discovery, Petitioners lacked sufficient evidence to support their claims against Respondent Funeral Directors for unlawful tying arrangements and conspiracy to fix prices in violation of Section 1 of the Sherman Act. Their decisions should not be reversed. Accordingly, this Court is respectfully requested to deny the Petition for Writ of Certiorari filed in this matter.

Dated: August 23, 1993

Respectfully submitted,

MEYER, UNKOVIC & SCOTT

RONALD L. HICKS, JR.

Counsel of Record for Respondents

SUPPLEMENTAL APPENDIX

APPENDIX INDEX

Page

District Court Order, dated May 27, 1993 .....SA-1

District Court Memorandum Order, dated July 23, 1993 .....SA-3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

GREENE COUNTY MEMORIAL PARK, a corporation; GREENE COUNTY MONUMENT AND VAULT COMPANY, a corporation,	)	
Plaintiffs,	)	CIVIL ACTION
v.	)	NO. 88-245
BEHM FUNERAL HOMES, INC., a corporation; FRANK J. BEHM, an individual; FRANK C. "CHUCK" BEHM, an individual; PEGGY BEHM, an individual; GREGORY ROHANNA, an individual; GORDON GREENLEE, an individual; BARRET GREENLEE, an individual; PAUL M. LESAKO, an individual; SAMUEL A. MILLIKEN, an individual; and DARRYL THROCKMORTEN, an individual,	)	
Defendants.	)	

ORDER

AND NOW, to-wit, this 27th day of May, 1993, the Court having considered the "Motion Pursuant to Rule 11 on Behalf of Defendants Behm Funeral Homes, Inc., Frank J. Behm, Frank C. 'Chuck' Behm, Peggy Behm, Gregory Rohanna, Paul Lesako, Samuel A. Milliken and Daryl Throckmorton For Counsel Fees and/or Other Sanctions Against Plaintiffs and Plaintiffs' Counsel, Louis M. Tarasi and Joseph J. Hinchliffe," and determining that

it is clear from the record that the plaintiffs' counsel violated Federal Rule of Civil Procedure 11 in continuing to prosecute this action after it was apparent that it had no merit, it is hereby ORDERED, ADJUDGED and DECREED that counsel for the defendants who filed the Motion for Rule 11 sanction (Document 78) shall by June 11, 1993, submit affidavits summarizing the number of hours they spent on this case, their expenses, and their hourly rates.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Judge

IN THE UNITED STATES DISTRICT COURT
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Defendants.	)	

MEMORANDUM ORDER

The facts of this case are set forth in detail in this Court's Opinion dated July 7, 1992. In short, the plaintiffs were a cemetery company and funeral vault company that also sold caskets. The plaintiffs asserted that the defendants, which were mostly funeral homes and the individual funeral directors who owned them, had joined together to drive the plaintiffs out of business and in doing so violated various federal antitrust laws and state

laws. After extensive discovery the defendants filed summary judgment motions, as did the plaintiffs. In our July 7, 1992 Opinion and Order this Court denied the plaintiffs' summary judgment motion and granted the defendants' summary judgment motions. Shortly thereafter most of the defendants filed a motion pursuant to Federal Rule of Civil Procedure 11 for counsel fees as sanctions against the plaintiffs' attorneys, Joseph J. Hinchliffe and Louis M. Tarasi, Jr.

After our decision granting summary judgment was affirmed by the Court of Appeals for the Third Circuit in an unpublished Opinion dated April 26, 1993 we granted the defendants' motion for Rule 11 sanctions and ordered the attorneys who filed the motion to submit affidavits summarizing the costs incurred by their clients in defending this lawsuit. We stated in this Order that it was clear from the record that the plaintiffs' attorneys had violated Rule 11 in continuing to prosecute this case after it was clear that there was no evidence supporting their claims. The affidavits submitted by defendants' counsel revealed that Behm Funeral Homes, Inc., Frank J. Behm, Frank C. Behm, Peggy Behm and Gregory Rohanna incurred $135,389.70 in legal fees and $8,642.67 in expenses. Defendant Paul Lesako incurred legal fees in the amount of $34,125.87 and $231.56 in expenses. Defendants Samuel A. Milliken and Daryl Throckmorton incurred $63,839.55 in legal fees and $8,924.83 in expenses. In total then, these defendants have spent $178,440.40 in attorneys' fees and $17,799.06 in expenses defending themselves in this action.

In response to our May 27, 1993 Order granting the defendants' motion for Rule 11 Sanctions, the plaintiffs

filed a motion for reconsideration. We will deny this motion and explain why we feel that plaintiffs counsel continued to prosecute this action long after it was clear that there was no evidence to support the allegations in the complaint and that Rule 11 sanctions are appropriate.

One of the plaintiffs' claims in their complaint, and in their Memorandum in Opposition to Defendants' Motions for Summary Judgment and in Further Support of Plaintiffs' Motions for Summary Judgment (Plaintiffs' Brief) was that the defendants conspired to hire away their employees and to interfere with their contracts with customers. Complaint ¶¶ 23, 25; Plaintiffs' Brief at 17. Yet at no point did the plaintiffs' counsel direct the Court to any evidence that supported these claims. This forced the Court to read all of the depositions filed in this case in an unsuccessful attempt to find some support for these allegations. *See* July 7, 1992 Opinion at 7-8.

The plaintiffs also claimed that the defendants' use of casket handling fees violated section 1 of the Sherman Act, 15 U.S.C. § 1. A key element to a section 1 claim is concerted action. In this case the plaintiffs presented no evidence that the defendants' use of casket handling fees was a concerted effort to drive the plaintiffs out of business. *Martin B. Glauser Dodge Co. v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The evidence acquired during discovery was actually to the *con*trary. The evidence revealed that not all the defendants even used casket handling fees and the ones that did used different rates and imposed their fees at different times over the years.

The plaintiffs also asserted that the defendants had engaged in a group boycott against them. Complaint ¶¶ 33-35. Although the exact nature of this claim was never described by the plaintiffs' counsel, it was baseless under any theory. The plaintiffs themselves admitted that only one of the defendants stopped doing business with them. *See* July 7, 1992 Opinion at 25. The other defendants continued to do business with the plaintiffs.

Plaintiffs' counsel included as a defendant in this case Peggy Behm. Ms. Behm filed a separate motion for summary judgment. In this motion she pointed out that although she works at the Behm Funeral Home, she took no part in its management. She explained that she is not a licensed funeral director and has never attended meetings of funeral directors. The plaintiffs responded to this motion by stating that Peggy Behm attended at least one meeting where the plaintiffs were "discussed with third persons" and that she is "in partnership with Frank Behm as to rentals of funeral equipment to Behm Funeral Home, Behm Leasing & Rental Company" and that she is a partner in Greene County Burial Vault Company. Plaintiffs' Memorandum in Opposition to Defendants' Motions for Summary Judgment at 1 n.2. In a supplemental response to Peggy Behm's summary judgment motion ordered by the Court, the plaintiffs' counsel stated that Peggy Behm's partnership and shareholder interests in the Behm entities create a "presumption of involvement in the conspiracies of her husband and Behm Funeral Home, Inc." Supplemental Response at 5. We granted Peggy Behm's motion for summary judgment and noted that the only entity named as a defendant in this case is Behm Funeral Home, Inc. in which Peggy Behm is only a

shareholder. The plaintiffs, even after having been ordered to file a supplemental response to Peggy Behm's summary judgment motion, failed to provide any evidence to support their contentions that she attended at least one meeting "with third parties" where the plaintiffs were discussed or that she participated in the "conspiracies of her husband and Behm Funeral Home." Despite having no evidence at all to support the plaintiffs' claims against Peggy Behm, plaintiffs' counsel continued to insist that the Court should deny Peggy Behm's summary judgment motion.

For the foregoing reasons we hold that the plaintiffs' counsel has violated Rule 11 in this case.

We could, we believe, in all fairness, order plaintiffs' counsel to pay more than the $20,000 imposed by the following order. We are not going to do so, however, because it appears that when this action was filed, based on the information the attorneys had at that time there may have appeared to be valid grounds for filing their complaint. The egregious error of plaintiffs' lawyers came after discovery was completed, and they continued to press the case when it should have been obvious that their efforts were doomed.

AND NOW, to wit, this 23rd day of July, 1993, it is ORDERED, ADJUDGED and DECREED that plaintiffs' counsel, Joseph J. Hinchliffe and Louis M. Tarasi, Jr. shall pay to the Clerk of Court the sum of twenty thousand dollars ($20,000.00) on or before August 1, 1993.

The Clerk shall then distribute fifty percent of these funds to attorney C. Robert McCall of the law firm of Picadio, McCall Kane & Norton to be distributed to its

clients Behm Funeral Homes, Inc., Frank J. Behm, Frank C. Behm, Peggy Behm and Gregory Rohanna. The Clerk shall distribute thirty percent of these funds to attorney Ronald Hicks, Jr. of the law firm of Meyer, Unkovic & Scott to be distributed to his clients Samuel A. Milliken and Daryl Throckmorton. The Clerk shall distribute the remaining twenty percent of these funds to attorney William K. Herrington of the law firm of Faderewski & Herrington to be distributed to his client Paul Lesako.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Judge